

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

BRADLEY M. CUNNINGHAM,

Plaintiff,

v.

ADAM FORTNEY, et al.,

Defendant.

CASE NO. 2:23-cv-01949-BHS-BAT

**ORDER ADOPTING REPORT AND
RECOMMENDATION AND
DIRECTING PAYMENT OF
FILING FEE**

Plaintiff is a prisoner serving an Oregon State sentence at the Oregon State Penitentiary in Salem, Oregon. On January 18, 2024, the assigned United States Magistrate Judge filed a Report and Recommendation indicating in 2001, the District of Oregon in *Cunningham v. Witt*, 3:01-cv-00565-KI found Plaintiff is subject to the three-strike rule, 28 U.S.C. § 1915(g) and is precluded from bringing any civil action or appeal *in forma pauperis* unless he establishes he is under imminent danger of serious physical injury.

In response, Plaintiff filed a motion for additional time to respond to the report and recommendation. Dkt. 16. Plaintiff also filed a letter on January 29, 2024, indicating he had submitted the filing fee. Dkt. 17. On February 1, 2024, the assigned Magistrate Judge issued an order indicating the clerk advises that the clerk's office received a check from Plaintiff but because it was in an incorrect amount, it was returned to Plaintiff. The Magistrate Judge ordered

1 Plaintiff must tender payment of the filing fee in the correct amount before this action can
2 proceed. Dkt. 22.

3 The Court also notes that on January 16, 2024, Plaintiff filed a Motion for Leave to
4 Proceed *In Forma Pauperis* in which he avers he receives over \$10,000 a year in Tribal per
5 capita payments, and that he has asked the Oregon Prison to issue a check to pay the filing fee in
6 this case. Dkt. 10.

7 Having reviewed the Report and Recommendation of the assigned United States
8 Magistrate Judge, any objections or responses to that, and the remaining record, the Court
9 FINDS and ORDERS:

10 1) The Court adopts the Report and Recommendation that Plaintiff is subject to the
11 three-strike rule and may not proceed *in forma pauperis*. Plaintiff has not contested that the
12 District of Oregon deemed him subject to the three-strike rule and the allegations contained in
13 the complaint Plaintiff submitted do not establish imminent danger of serious physical harm.

14 2) Even if Plaintiff were not subject to the three-strike rule, his submissions show
15 that he has the financial resources to pay the filing fee. He indicates he receives \$10,000 a year
16 or more in Tribal per capita payments and avers that he has submitted a filing fee check to the
17 clerk of court.

18 3) The clerk has indicated that it indeed has received a check from Plaintiff but
19 returned it to him because it was in the wrong amount.

20 4) Accordingly, Plaintiff may not proceed *in forma pauperis* and before this action
21 may proceed must pay the filing fee.

22 5) Plaintiff shall submit the filing fee no later than **February 16, 2024** or the Court
23 will dismiss the action.

1 6) Because Plaintiff has not yet paid the filing fee, he shall not file motions for
2 discovery, or motions to serve Defendants. Any such motions filed before payment of the filing
3 fee shall be stricken.

4 7) The clerk shall note on the docket whether it has received any check from
5 Plaintiff, the amount of the check, and whether the check was sufficient or returned to Plaintiff in
6 order to ensure there is a clear record.

7 7) The clerk shall also provide a copy of this order to Plaintiff.

8 DATED this 5th day of February, 2024.

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BENJAMIN H. SETTLE
United States District Judge